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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

JOHN D. HADDEN,
CLERK

Appellant,

NOT FOR PUBLICATION

V.

Case No. F-2018-882

Appellee.

ROWLAND, JUDGE:

Appellant Amber Lee McAnerney appeals her Judgment and Sentence from the District Court of Comanche County, Case No. CF-2017-518, for Child Abuse by Injury, in violation of 21 O.S.Supp.2014, § 843.5(A). The Honorable Irma J. Newburn, District Judge, presided over McAnerney's jury trial and sentenced her, in accordance with the jury's verdict, to four years imprisonment.¹ McAnerney appeals raising the following issues:

- (1) whether there was sufficient evidence to convict her beyond a reasonable doubt of Child Abuse by Injury;

¹ Under 21 O.S.Supp.2015, § 13.1, McAnerney must serve 85% of her sentence of imprisonment before she is eligible for parole consideration.

- (2) whether plain error occurred when child hearsay statements were introduced into evidence without notice and a reliability hearing;
- (3) whether instructional error violated her right to due process;
- (4) whether the trial court abused its discretion when it overruled her motion for a new trial;
- (5) whether she was denied effective assistance of counsel; and
- (6) whether cumulative errors deprived her of a fair trial and reliable outcome.

We find relief is not required and affirm the Judgment and Sentence of the district court.

1.

McAnerney claims that the evidence presented at trial was insufficient to support her conviction for child abuse by injury. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of

conflicting evidence as long as it is within the bounds of reason. See *Day v. State*, 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298. This Court also accepts all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. The State proved each element of the crime of child abuse by injury beyond a reasonable doubt. This proposition is without merit.

2.

McAnerney contends that the trial court's admission of child hearsay statements was error as the requirements of 12 O.S.Supp.2013, § 2803.1 were not followed; the State failed to provide notice of its intention to introduce the hearsay statements or hold a reliability hearing. She also asserts that the evidence was inadmissible because the hearsay statements were not trustworthy.

McAnerney concedes that she waived appellate review of this claim for all but plain error when she failed to object at trial. To be entitled to relief for plain error, McAnerney must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his

substantial rights, meaning the error affected the outcome of the proceeding.” See *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883.

Section 2803.1 provides an exception to the hearsay rule which allows for the admission of a statement by a child under thirteen years old describing acts of physical or sexual conduct performed on or with the child. The provision requires notice be given of the intent to introduce the hearsay statement and an in-camera hearing be held for the trial court to determine that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. If the statement is found to be inherently trustworthy it is admissible if the child either testifies at trial or is unavailable as defined in 12 O.S.Supp.2014, § 2804.

The purpose of the notice requirement is to “provide the adverse party with an opportunity to prepare to answer the statement.” 12

O.S.Supp.2013, § 2803.1(B). The lack of statutory notice, while actual error, may be harmless where the defense has constructive notice of the State's intent to introduce the hearsay. See *Matter of W.D.*, 1985 OK 65, ¶¶ 14-15, 709 P.2d 1037, 1043. The record supports the conclusion that McAnerney had constructive notice that the State intended to introduce the hearsay statements.

We next address the trial court's failure to hold a hearing to determine the reliability of the hearsay statements. We have previously recognized that failure to hold a hearing in accordance with the directives of Section 2803.1(A) is error but that such error is subject to harmless error review. *Simpson v. State*, 1994 OK CR 40, ¶ 19, 876 P.2d 690, 698. McAnerney argues that the child hearsay statements did not meet the Section 2803.1 criteria for admissibility because they were inconsistent. The fact that the victim's statements changed does not render the hearsay untrustworthy; the initial statements were not materially inconsistent or unbelievable. Furthermore, the victim testified at trial and was subject to cross-examination. The failure to hold the required reliability hearing was

actual error which was plain or obvious.² However, under the circumstances of this case, the error did not affect the outcome of the proceeding. The hearsay statements met the test of trustworthiness required by statute and the failure to hold a hearing as required by Section 2803.1 was not, in this case, plain error.

McAnerney argues that failure to hold a Section 2803.1 reliability hearing operated to deny her rights under the confrontation clause.

[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford v. Washington, 541 U.S. 36, 59, fn.9, 124 S.Ct. 1354, 1369, fn.9, 158 L.Ed.2d 177 (2004) (internal citations and quotations omitted). Here, the victim appeared at trial, testified, and was subject

² In fact, it is painfully plain and obvious error. Reliability hearings have been required by Section 2803.1 for over twenty years. Why they are not held routinely and as a matter of course whenever the State seeks to introduce a statement made by a child under thirteen regarding an act of physical or sexual abuse is a mystery to this Court. Adherence to the notice and hearing requirements of Section 2803.1 would greatly reduce this easily avoidable trial error.

to cross-examination. There was no violation of McAnerney's Sixth Amendment right to confrontation.

3.

McAnerney argues that instructional error requires reversal. "It is settled law that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (citing *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). See also *Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. Because the record does not show that trial counsel either objected to the trial court's failure to give the instructions at issue or request the same, review on appeal is for plain error. See *Rutan v. State*, 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855. To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Again, we will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the

judicial proceedings or otherwise represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883.

McAnerney claims that the trial court erred by failing to instruct jurors that she would have to serve 85% of her sentence for child abuse by injury before becoming eligible for parole consideration. See *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83 (jurors should be instructed that a defendant convicted of certain enumerated crimes must serve 85% of her sentence before becoming eligible for parole); 21 O.S.Supp.2015, § 13.1. The trial court should have given this uniform instruction. However, this error does not automatically require reversal. See *Brown v. State*, 2008 OK CR 3, ¶ 15, 177 P.3d 577, 581. Nothing in the record suggests that the jury's sentencing recommendation was the result of concern that McAnerney would be released too quickly on parole. No factors are present which could lead this Court to conclude that the absence of this instruction affected the outcome of the proceeding. The failure to give this instruction in this case was not plain error. Relief is not required.

McAnerney also complains that the trial court erred in failing to sua sponte instruct the jury on how to consider her statements. Instruction No. 9-12 requires a jury to find a defendant's statements to officers were voluntary beyond a reasonable doubt before they consider them. The State presented evidence that the disputed statements were voluntary. None of McAnerney's statements were made under coercive circumstances. There is no reasonable possibility that McAnerney's jury would have accepted her current claim that her statements were involuntary even if the jury had been instructed according to OUJI-CR(2d) 9-12. Trial court's failure to include this uniform instruction was not plain error. *See Jones v. State*, 2006 OK CR 5, ¶ 39, 128 P.3d 521, 538-39 (failure to give Instruction No. 9-12 harmless because the outcome of the trial was not affected).

Finally, McAnerney contends that the trial court erred when it failed to instruct the jury concerning the requirement of post-imprisonment supervision. Title 22 O.S.Supp.2014, 991a(A)(1)(f) provides that a trial court may sentence a defendant to confinement as provided by law along with a term of post-imprisonment

community supervision for certain listed offenses involving sexual abuse or sexual exploitation. Accordingly, the Notes on Use for OUJI-CR(2d) 10-13C provide that use of this instruction is limited to the sexual offenses involving sexual abuse or sexual exploitation listed in Section 991a(A)(1)(f). The crime for which McAnerney was convicted, child abuse by injury, is not one of the enumerated offenses for which the instruction is mandatory. The trial court cannot be found to have committed plain error for failing to give the jury an instruction which was not required. This proposition is denied.

4.

Trial concluded on June 6, 2018. On June 18, 2018, McAnerney filed a motion for new trial based upon the trial court's failure to instruct the jury on the 85% Rule. This motion was subsequently denied and McAnerney argues on appeal that this ruling was error. We review a trial court's denial of a motion for new trial for an abuse of discretion. *Spence v. State*, 2008 OK CR 4, ¶ 8, 177 P.3d 582, 584. We find no abuse its discretion.

5.

McAnerney contends that she was denied constitutionally effective assistance of counsel by numerous failings of defense counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, McAnerney must affirmatively prove prejudice resulting from her attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148.

The merits of most of the claims underlying McAnerney's ineffective assistance of counsel challenge have been rejected in the preceding propositions of error. The other claim, that defense counsel rendered deficient performance by failing to request a *Jackson v. Denno*³ hearing is also without merit. There is no reasonable probability that, but for counsel's alleged unprofessional error in

³ *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

failing to request a *Jackson v. Denno* hearing, the result of the proceeding would have been different. McAnerney has failed to show either that error affected the outcome of her case. Consequently, she has not made the requisite showing of prejudice. Her ineffective assistance of counsel claim is denied.

6.

McAnerney asserts that even if no individual error in her case merits reversal, the cumulative effect of the errors committed warrants a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez v. State*, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, considered

individually or cumulatively, that deprived McAnerney of a fair trial.
This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**.
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF COMANCHE COUNTY
THE HONORABLE IRMA J. NEWBURN, DISTRICT JUDGE**

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OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur in Results

KUEHN, V.P.J.: Concur in Results

LUMPKIN, J.: Concur

HUDSON, J.: Concur

KUEHN, V.P.J., CONCURRING IN RESULT:

I concur with the result. The Majority rightfully notes in footnote 2 that the lack of reliability hearings in trials is “painfully plain and obvious.” However, I part from the Majority when, after error is found, they proceed to review the record to determine the statements meet the trustworthiness test required by the statute, and therefore find the error harmless. This Court must stop holding trustworthiness hearings on appeal.

As I have stated before, “[b]ecause hearsay statements from a child victim can have a powerful effect on a jury, the Legislature directs trial courts to review that evidence in advance of its admission, giving both parties a chance to test it and argue for or against its reliability.” *Loya v. State*, F-2017-65 (unpub. Aug. 23, 2018) (Kuehn, J., specially concurring); *Gordon v. State*, 2019 OK CR 24, 451 P.3d 573, 587-88 (Kuehn, V.P.J., concurring in part and dissenting in part). We should honor the intent of that statute, and halt our own review of the record to determine reliability.

If the Court continues to review the record to determine the trustworthiness of the statements, the parties and the trial courts

will continue to ignore the mandate of the statute to hold a pre-trial hearing. I would find the failure to hold a hearing was error and therefore the statements were not admissible. As the child testified at the trial about what happened and was subject to cross-examination regarding his inconsistent statements, I would find the error harmless.